APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 1, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4671

D. C. Docket No. 95-8707-CV-KLR

BOAT OWNERS ASSOCIATION
OF THE UNITED STATES,

Plaintiff-Appellee,

versus

SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(February 1, 1999)

Before EDMONDSON, COX and MARCUS, Circuit Judges.

PER CURIAM:

The district court's judgment is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 1, 1999

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4671

District Court No. 95-8707-CV

BOAT OWNERS ASSOCIATION
OF THE UNITED STATES,

Plaintiff-Appellee,

versus

SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

Before EDMONDSON, COX and MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

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UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the defendants-appellants, pay to the plaintiff-appellee, the costs on appeal to be taxed by the Clerk of the Court.

Entered: February 1, 1999
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: APR 05 1999

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND STRIKING DEFENDANTS' RESPONSE DATED AND FILED DECEMBER 2, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-8707-CIV-RYSKAMP

BOAT OWNERS ASSOCIATION
OF THE UNITED STATES,

Plaintiff,

vs.

SEA TOW SOUTH PALM BEACH, INC., *et al.*,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND STRIKING DEFENDANTS' RESPONSE

THIS CAUSE came before the Court upon the plaintiff Boat Owners Association of the United States' ("Boat Owners") motion for summary judgment **[DE-36]**. The defendants Sea Tow South Palm Beach, Sea Tow Services of the Palm Beaches, Inc., Glenn F. Rosenberger, and Richard B. Beck (collectively "Sea Tow") have untimely responded. Because the Court will strike the defendants'

response, no reply is necessary. This motion is ripe for adjudication.

I. BACKGROUND

This is a suit for trademark infringement by Boat Owners against one of its former licensees, Sea Tow. Boat Owners states four counts in its complaint: (I) trademark infringement in violation of 15 U.S.C. § 1114; (II) false representation in violation of 15 U.S.C. § 1125(a); (III) dilution in violation of F.S.A. § 495.151; and, (IV) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), F.S.A. § 501.201-203. Boat Owners seeks injunctive relief, damages, and attorney's fees. In the instant motion, Boat Owners requests that the Court find the defendants liable, enter a permanent injunction against the defendants, and hold a trial on the issue of damages and attorney's fees.

Boat Owners and Sea Tow are the marine equivalent of AAA. (Compl. ¶¶ 2, 3.) Although Boat Owners and Sea Tow perform similar services — providing their members with services such as marine towing, emergency fuel delivery, and battery jump starting — the companies are organized differently. (Pl.'s Stmt. of Uncontested Facts at 3.) Boat Owners licenses companies to provide marine services to BOAT/U.S. members. These companies bill BOAT/U.S. for expenses incurred in providing services to BOAT/U.S. members (*Id.*) While Boat Owners prefers for BOAT/U.S. licensed-towers to service its members, Boat Owners will reimburse non-BOAT/U.S. towers who provide services when BOAT/U.S. towers are unavailable. By

contrast, Sea Tow pays individual towing companies on a yearly basis to tow Sea Tow's members. (*Id.* at 6.)

Boat Owners complains that Sea Tow is falsely representing itself as a BOAT/U.S. tower and is towing BOAT/U.S. members when BOAT/U.S. licensed-towers are available. On July 3, 1995, a vessel in distress requested assistance from a BOAT/U.S. towing company. A Sea Tow company which was formerly licensed by BOAT/U.S. responded to the message and falsely represented that it was a BOAT/U.S. tower. When a licensed BOAT/U.S. tower challenged Sea Tow, the latter did not respond to the distress call. (*Id.* at 6-7.) BOAT/U.S. alleges that Sea Tow has gained over $50,000 in reimbursements from Boat Owners making false representations such as the one described.

II. DISCUSSION

A. Untimely Response to Boat Owners' Motion for Summary Judgment

1. Background

Boat Owners filed its motion for summary judgment on September 12, 1997. On September 17, the Court granted Sea Tow's motion for an enlargement of time until October 6 to file its response to the motion for summary judgment. On October 3, the Court granted — over Boat Owners' objection — a second motion to enlarge time. On October 22, one day after the summary judgment response was due, the parties filed a joint motion to stay or continue the filing of the summary judgment response, the pre-trial stipulation,

and trial. Because trial was set for December 8, the Court denied the motion. On October 28, the Court set a hearing on Boat Owners' motion for summary judgment which, at the parties' request, the Court rescheduled twice. The hearing was finally held on December 1. Although Sea Tow's response to the motion for summary judgment was due on October 22, Sea Tow did not file a motion for enlargement of time. Sea Tow did not file its response until Friday, November 28, the day after Thanksgiving, and less than one business day before the Monday hearing. Although the certificate of service on the response states that it was hand-delivered to opposing counsel on Friday, opposing counsel stated at the Monday hearing that they had just received, and had not yet read, Sea Tow's response.

2. Merits

At the summary judgment hearing, Boat Owners moved to strike Sea Tow's response as untimely. Even if Boat Owners had not made this motion, the Court would strike the untimely filed response. Local Rule 7.1(a) of the Southern District of Florida establishes the time limits for filing responses to motions. Fed. R. Civ. P. 6(b) permits the Court to accept untimely filed pleadings "for cause shown" if a request for enlargement is made prior to expiration of the period originally prescribed, or upon a motion after expiration of the specified period "where the failure to act was the result of excusable neglect."

Where the adverse party is not a *pro se* litigant, a Court may — consistent with the Federal Rules of Civil Procedure — require conformity with the Local Rules. *Clinkscales v.*

Chevron U.S.A., Inc., 831 F.2d 1565, 1568 (11th Cir. 1987) (court properly struck surrebuttal summary judgment brief filed six months late). *See Howell v. Tanner*, 650 F.2d 610, 614 (5th Cir. 1981), *cert. denied*, 456 U.S. 918, 102 S.Ct. 1775, 72 L.Ed.2d 178 (1982). "Absent an affirmative showing by the non-moving party of excusable neglect . . . a court does not abuse its discretion in refusing to accept out-of-time affidavits." *Clinkscales*, 831 F.2d at 1568; *Farina v. Mission Inv. Trust*, 615 F.2d 1068, 1076 (5th Cir.1980); *Beaufort Concrete Co. v. Atlantic States Constr. Co.*, 352 F.2d 460 (5th Cir.1965), *cert. denied*, 384 U.S. 1004, 86 S.Ct. 1908, 16 L.Ed.2d 1018 (1966). The same standard applies to late pleadings.

The standard for what constitutes "excusable neglect" is more than a mere formality. "It is well established . . . that '[t]he fact that counsel has a busy practice does not establish excusable neglect under Rule 6(b)(2).' " *Clinkscales*, 831 F.2d at 1569. *See McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981), *cert. denied*, 456 U.S. 979, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982) (no "excusable neglect" for failing to timely respond to summary judgment motion when only excuse was that attorney was solo practitioner with busy schedule); *In re South Atlantic Financial Corp.*, 767 F.2d 814, 818 (11th Cir. 1985), *cert. denied sub nom Biscayne 21 Condominium v. South Atlantic Financial Corp*, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311.; *Beaufort Concrete Co., supra* (no excusable neglect where party offered no excuse for failure to comply with time requirement).

In the instant case, Sea Tow filed no motion requesting the Court to accept its untimely response. Nor has it offered an excuse for its failure to comply with the time requirement. At oral argument, one of Sea Tow's attorneys stated that he had been busy with two trials during the last month. The Court notes that a busy schedule is not "excusable neglect." *McLaughlin, supra.* The parties may not, by stipulation, control the Court's docket to extend a trial date which has been set for over ten months. Nor may one party, after the Court vetoes the parties' attempt to control its docket, willfully ignore a response deadline without consequence. Accordingly, the Court will STRIKE FROM THE RECORD the defendants' pleadings filed on November 28, 1997. The Court will, however, consider the arguments which Sea Tow's counsel presented at the summary judgment hearing.

B. Boat Owners' Motion for Summary Judgment

Although it would be within the Court's discretion to grant Boat Owners' motion for summary judgment by default, the Court will *sua sponte* examine the motion in light of the applicable law and the arguments presented at the summary judgment hearing.

1. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of

showing, by reference to materials on record, that there are no genuine issues of material fact to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). A moving party may discharge this burden by exposing an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325.

2. Merits

At the heart of Boat Owners' complaint are its claims for trademark infringement and false representation. 15 U.S.C. § 1114 imposes liability upon "any person" who "without the consent of the registrant . . . use[s] in commerce any . . . imitation of a registered mark in connection with the sale, . . . distribution, or advertising of any goods or services . . . [when] such use likely to cause confusion." The Eleventh Circuit requires a registrant to establish two elements to prevail upon a claim of trademark infringement: "(1) its mark was used in commerce by the defendant without the registrant's consent and (2) the unauthorized use was likely to cause confusion, or to cause mistake or to deceive." *Burger King Corp. v. Manson*, 710 F.2d 1480, 1491 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984). 15 U.S.C. § 1125 imposes liability upon "any person who . . . in connection with any goods or services . . . uses in commerce any word, term, name [or] symbol . . . which . . . is likely to cause confusion . . . as to the origin or sponsorship . . . in commercial advertising." The same set of facts which enables a registrant to recover under § 1114 will permit

recovery under § 1125. *Babbit Electronics, Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1181 (11th Cir. 1994).

Because Boat Owners has established each element of trademark infringement, it is entitled to judgment as a matter of law. Boat Owners is the owner of Registration No. 1,675,310. (Exh. 8 to Pl.'s Mot. for Summ. J.) This registration entitles Boat Owners to use the mark "BOAT/U.S." for, among other things, "arranging for towing reimbursement." The mark was used in a manner that satisfies the Lanham Act's interstate commerce requirement. *See Rickard v. Auto Publisher, Inc.*, 735 F.2d 450, 453 (11th Cir. 1984) (advertising that affects interstate commerce is commerce); *Babbit Electronics*, 38 F.3d at 1173 (fact that registrant used marks in interstate commerce satisfies the Lanham Act). Sea Tow used the BOAT/U.S. mark without Boat Owners' consent. (Pl.'s Stmt. of Uncontested Facts at 5, 7.) This unauthorized use is likely to cause confusion. *See id.*(likelihood of confusion exists as matter of law if defendant intended to derive benefit from plaintiff's trademark); *Burger King*, 710 F.2d at 1492 (former franchisee liable for infringement for continuing to use franchisor's trademark); *Anheuser-Busch, Inc. v. A-B Distrib., Inc.*, 910 F. Supp. 587, 594 (M.D. Fla. 1995) (falsely suggesting affiliation with trademark owner in manner likely to cause confusion constitutes infringement).

As to Count III, there is a strong likelihood of dilution under F.S.A. § 495.151. Purchasers may associate Sea Tow's towing and emergency marine services with Boat Owners' towing companies. *See Babbit*, 38 F.2d at 1182.

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Boat Owners is entitled to summary judgment on Count IV. The FDUTPA gives a "consumer" a cause of action for damages against any violator of the Act, F.S.A. § 501.211(2), and gives any "person" a cause of action for equitable relief against a violator of the Act. F.S.A. § 501.211(1). The Court finds that, as a matter of law, Boat Owners is a competitor and not a "consumer" under the statute. *See Packaging Corp. Int'l v. Travenol Labs., Inc.*, 566 F. Supp. 1480 (S.D. Fla. 1983). *See also LJS Co. v. Marks*, 480 F. Supp. 241 (S.D. Fla. 1979). Because Boat Owners is not a "consumer," it may not recover damages. *Babbit Electronics*, 38 F.3d at 1182 n.7 (11th Cir. 1994). It may, however, seek injunctive relief and attorney's fees. *See Big Tomato v. Tasty Concepts, Inc.*, No. 97-1509, 1997 WL 523677 (S.D. Fla. Aug. 5, 1997).

III. CONCLUSION

Having considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Clerk of the Court shall STRIKE FROM THE RECORD the defendants' pleadings filed on November 28, 1997: the memorandum of law in opposition to plaintiff's motion for partial summary judgment, the declaration of Cptn. Glenn Rosenberger, and the declaration of Cptn. Timothy Morgan. It is further

ORDERED AND ADJUDGED that Boat Owners' motion for summary judgment **[DE-36]** is GRANTED. The

Court finds Sea Tow liable on all counts of the plaintiff's complaint. It is further

ORDERED AND ADJUDGED that Sea Tow, its affiliates, and all individual defendants are permanently enjoined from making false representations such as the July 3, 1995 representation, which are likely to cause confusion among Boat Owners' members or other members of the consuming public. It is further

ORDERED AND ADJUDGED that Sea Tow shall, within thirty (30) days of receipt of this Order, file a written report with the Court which sets forth in detail the manner and form in which the defendants have complied with this Order. It is further

ORDERED AND ADJUDGED that the parties shall attend the December 3 calendar call, and shall submit a joint pretrial stipulation by December 5. The Court will try the issue of damages at trial if the parties have not amicably resolved this issue by the trial date.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 2 day of December, 1997.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPENDIX D — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 26, 1998 AND FILED MARCH 27, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-8707-CIV-RYSKAMP

BOAT OWNERS ASSOCIATION
OF THE UNITED STATES,

Plaintiff,

vs.

SEA TOW SOUTH PALM BEACH, INC., *et al.*,

Defendants.

AMENDED FINAL JUDGMENT

THIS CAUSE came before the Court on the Plaintiff's BOAT OWNERS OF THE UNITED STATES motion for amended final judgment **[DE-91]** and after review of the Court's December 2, 1997 Order granting plaintiff's motion for summary judgment, the Court's January 15, 1998 Order denying defendant's motion for rehearing, and the Court's Final Judgment entered February 4, 1998. The plaintiffs timely filed a motion to amend judgment pursuant to Fed. R. Civ. P. 59(e). Modification of the final judgment is consistent with *United Steelworkers of America v. USX Corp.*, 966 F.2d 1394, 1399 (11th Cir. 1992) and the intent of the final judgment. Accordingly, it is

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ORDERED AND ADJUDGED that the plaintiff's motion to amend **[DE-91]** is GRANTED as follows

1. Defendants, SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., GLENN F. ROSENBERGER, and RICHARD B. BECK are liable to the Plaintiff on all four of the counts to Plaintiff's Complaint: trademark infringement in violation of 15 U.S.C. §1114; false representation in violation of 15 U.S.C. §1125(a); dilution in violation of Fla. Stat. §495.151; and violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201-203.

2. SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., their affiliates and GLENN F. ROSENBERGER and RICHARD B. BECK, are permanently enjoined from making false representations which are likely to cause confusion among the members of BOAT OWNERS ASSOCIATION OF THE UNITED STATES, or other members of the consuming public.

3. The Court makes no determination on the issues of damages and attorney's fees. The Court, however, retains jurisdiction to determine the questions of entitlement to and amount of damages and attorney's fees in connection with the violations referenced above which shall only be considered if:

(a) the injunction established in this Court's Order of December 2, 1997 and further set forth herein, is allegedly violated; and/or

(b) an appeal is filed in connection with the Order Granting Plaintiff's Motion for Summary Judgment and Striking Defendant's Response or this Final Judgment. The Court will only consider the issue of damages and attorney's fees in connection with an appellate filing upon the conclusion of such appellate proceedings.

4. Plaintiff's trademark BOAT/U.S. is valid and was infringed at least once by Defendants when Defendants represented that Defendants were *bona fide* BOAT/U.S. licensees rather than SEA TOW licensees.

5. SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., their affiliates and GLENN F. ROSENBERGER and RICHARD B. BECK are hereby permanently enjoined from representing to anyone calling for BOAT/U.S. marine services that said parties are BOAT/U.S. licensees, and said parties must instead represent to anyone calling for BOAT/U.S. marine services that said parties are SEA TOW licensees. Said parties are further permanently enjoined from representing to anyone calling for marine services that said parties are BOAT/U.S. licensees when said parties are not BOAT/U.S. licensees.

6. The Final Judgment entered February 4, 1998 is VACATED and replaced with this Amended Judgment.

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DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 26 day of March, 1998.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE